No. 10383.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

THOMPSON PRODUCTS, INC.,

Respondent.

BRIEF FOR RESPONDENT THOMPSON PRODUCTS, INC.

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Jurisdiction.

This case is before the Court on petition of the National Labor Relations Board for enforcement of its order issued against respondent pursuant to Section 10(c) of the National Labor Relations Act [49 Stat. 449 (1935), 29 U. S. C. Secs. 151-166 (Supp. II, 1936)]. The jurisdiction of this Court is based upon Section 10(e) of the Act. Respondent is an Ohio corporation having its principal place of business in Cleveland, Ohio, and with industrial plants in Cleveland, Ohio; Detroit, Michigan; and Bell, California. This proceeding involves only the Bell, California, plant where the alleged unfair practices are asserted to have occurred.

The decision and order of the Board (46 N. L. R. B. No. 64) is set forth at pages 46-49 of the record, the intermediate report of the trial examiner is set forth at pages 50-79 of the record, and the amended complaint of the Board and respondent's answer thereto are set forth at pages 32-38 and 28-30, respectively, of the record.

Statement of the Case.

On December 31, 1942, the Board issued its Decision Findings of Fact, Conclusions of Law, and Order [46 N. L. R. B. No. 64, R. 46-49]. Its Findings and Conclusions may be briefly summarized as follows: Respondent dominated and interfered with the formation and administration of Pacific Motor Parts Workers Alliance (hereinafter referred to as Alliance), and contributed support to it, and by these and other acts, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby violated Sections 8(1) and (2) of the Act. The Board ordered respondent to cease and desist from dominating and interfering with the administration of or contributing financial or other support to the Alliance or any other labor organization, from recognizing the Alliance or giving effect to the collective bargaining between the Alliance and respondent, and from in any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bar-

gaining or other mutual aid and protection, as guaranteed in Section 7 of the Act. The Board further ordered respondent to withdraw all recognition from and completely disestablish the Alliance, and post appropriate notices.

On March 10th, 1943, the Board filed with this Court its petition for enforcement of its order [R. 81-85]. On March 17, 1943, respondent filed its answer to the petition [R. 89-92]. In said answer, respondent challenges the sufficiency of the evidence to support the Board's above mentioned Findings and Conclusions and questions the propriety of the Board's Order.

Respondent does not question the applicability of the National Labor Relations Act to its operations or the jurisdiction of the Board over respondent.

The pertinent provisions of the National Labor Relations Act are set forth in Appendix "A", *infra,* p. 41.

ARGUMENT.

I.

The Petition for Enforcement Must Be Denied Under the National Labor Relations Board Appropriation Act, 1944, Which Stabilizes Bargaining Relations for the Duration.

The Board has found that the Alliance was a company-dominated union, and has, therefore, ordered the respondent to disestablish it, to cease bargaining with or recognizing it or giving effect to the contract with it. Although, we submit, the Board's findings and conclusions are not supported by substantial evidence, even if we assume for purposes of argument that the Board's findings, conclusions, and order were in every respect valid when issued, the petition for enforcement must be denied. Under a recent enactment of Congress, existing collective bargaining representatives are not to be disturbed by the Board unless a complaint is filed within three months of the execution of a labor agreement, which was not done in the instant case.

By the National Labor Relations Board Appropriation Act, 1944 (Title IV, Labor-Federal Security Appropriation Act, 1944, Pub. 135, Chpt. 221, 78th Cong. 1st Sess., H. R. 2935), approved July 12, 1943, Congress made appropriations to meet the expenses of the Board for the fiscal year ending June 30, 1944, and in so doing provided as follows:

> "* * * No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed: *Provided,* That, hereafter, notice of such agree-

ment shall have been posted in the plant affected for said period of three months, said notice containing information as to the location at an accessible place of such agreement where said agreement shall be open for inspection by any interested person."

The above provision was precipitated by the action of the Board in issuing a complaint, at the instigation of the CIO, against Henry J. Kaiser's Portland, Oregon, shipyard to set aside his AFL contract on the ground it is invalid because the AFL was not the duly selected representative of his employees at the time the contract was entered into (11 Lab. Rel. Rep. 354, 498, 598). The purpose of the above provision was, in the words of Senator Bridges, "to stabilize labor differences during this critical wartime" (89 Cong. Rec. 6648). This was to be accomplished by freezing collective bargaining relations for the duration of the war and thereby prevent, during these critical times, the interference with production which invariably follows N. L. R. B. intervention in attacking the validity of collective bargaining agreements or in holding elections. Congress, therefore, took away from the Board jurisdiction to disturb existing union-employer collective bargaining relationships. For the convenience of the Court in Appendix "B", *infra*, page 46, we briefly discuss the legislative history of this provision with pertinent quotations from the statements of the legislators relative to its purpose and effect.

Though Congress did not directly amend the National Labor Relations Act because the provision was to be effective only for the duration, there can be no doubt that Congress by the specification in the Appropriation Bill did remove all jurisdiction from the Board to take any action

affecting established (for more than three months) collective bargaining relationships. Thus, the Congressmen who opposed the measure did so because, in the words of Senator Wagner, the author of the National Labor Relations Act, it "would practically repeal the Labor Relations Act" (89 Cong. Rec. 7104).[1] Senator McCarran, who was in charge of the Bill in the Senate, explained the purpose of the provision as follows (89 Cong. Rec. 7103):

> ". . . We believe that when agreements are now in existence, regardless of whom the agreements may favor, the agreements should be frozen, if I may use that term, or at least stabilized for the duration of the war, and not disrupted by confusion, misunderstanding, elections, or what not."

In the instant proceeding the Board seeks to disestablish the Alliance and to nullify its contract with the respondent. That collective bargaining agreement [R. 188-208], which is effective for one year subject to automatic renewal from year to year thereafter unless terminated by a written notice thirty days prior to an anniversary date, was entered into on November 10, 1941. No charge against the Alliance, the respondent, or this contract was filed until May 1, 1942 [R. 1116], on which date the United Automobile, Aircraft and Agricultural Implement Workers of America, CIO (hereinafter referred to as the Union) filed its initial charge with the Board. The Board did not issue its complaint against respondent until August 28, 1942 [R. 3-7], more than nine months after execution of the agreement. Under such circumstances, in view of

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[1] "It would virtually repeal the Wagner Act and would not stabilize anything" (Senator Truman, 89 Cong. Rec. 7103). "The pending amendment would virtually repeal or nullify the Wagner Act, so far as the organizing of the men, or the right of men to vote for their collective-bargaining agents is concerned" (Senator Reed, 89 Cong. Rec. 7104).

the provisions of the National Labor Relations Board Appropriation Act, 1944, the Board has no jurisdiction to continue with this proceeding against respondent, engaged in vital aircraft parts production, and the same must be dismissed.

There can be no question but that this Act applies to pending cases. Thus, it was designed to require a dismissal of the Kaiser case, in which hearings were held by the Board many months ago. The Board has just recently issued to the parties in that case an order to show cause why it should not be dismissed under this new Act.

Furthermore, there is no doubt (notwithstanding the Board's *present* assertions to the contrary) that the Act removes jurisdiction from the Board to upset existing collective bargaining agreements, even though the union involved is an illegal, company-dominated union. Robert B. Watts, general counsel of the Board, in instructions to the Board's staff has just given the following interpretation of the effect of the amendment to the Appropriations Act in proceedings involving allegedly company-dominated unions (12 Lab. Rel. Rep. 805, 806):

> "*3. 8(2) Cases.* Cases involving domination or interference with the formation or administration of a labor organization, regardless of the existence of an agreement with the allegedly illegal organization are not covered by the amendment. In such cases the Board will proceed in all respects as before and will issue its normal 8(2) order."

There is absolutely no merit whatsoever in the position taken by the Board's counsel. On the contrary, until the promulgation of this interpretation it was conceded by everyone, *including the Board itself,* that the effect of the

Act was to prevent the upsetting of existing labor agreements, whether they were with a company-dominated union, the AFL, the CIO, or an independent union. We submit that the Act does prevent proceedings to set aside contracts with allegedly company-dominated unions, for the following reasons:

(1) The Act prohibits disturbing an "agreement between management and labor". The Act does not limit its prohibition to contracts with the AFL or the CIO or with unions which are the representatives of the employees under Section 9(a) of the National Labor Relations Act. There can be no doubt but that the contract between the respondent and the Alliance was a contract between management and labor. The Board's complaint herein alleged [R. 5] and our answer admitted [R. 29] that "the Alliance is a labor organization as defined in Section 2, subdivision (5) of the [National Labor Relations] Act." Certainly. therefore, respondent's contract with the Alliance was a contract with "labor". The Act is clear and unambiguous and any attempt to read an exception into the Act which is not expressed therein is clearly unwarranted.

(2) The purpose of the amendment to the Appropriations Act was to prevent the Board from disturbing existing labor agreements so as to avoid interference with production. Production is interfered with by Board intervention just as much when the union is a company-dominated union as when the union is a nationally affiliated union free from employer domination. Congress fully recognized that for the duration of the war it was removing employee protection under the Wagner Act, but it did so be-

cause it appreciated that in this critical period all-out production was more vital than the protection of such rights.

(3) In the discussions of the Bill on the floor of Congress, not a single word was uttered by any Congressman even indicating that contracts with company-dominated unions would not come within the scope of the provision. On the contrary, the comments of all the Congressmen were to the effect that the provision would apply to *all* contracts with *any* union.

(4) On June 17, 1943, the day after the House amended the Appropriations Bill to include the prohibition against upsetting existing labor relations, the Board issued a statement opposing this amendment in which it said in part (12 Lab. Rel. Rep. 595, 596):

> "Under the terms of the amendment *no contract, regardless of whether made with a completely company-dominated union,* or made with other unions as a result of collusion, fraud, or duress,—and completely regardless of whether the contracting union has any members whatever among the employees affected—can any longer be challenged if it has been in effect three months." (Italics supplied.)

The Board correctly interpreted the effect of the House amendment which was passed by Congress in the identical language.

(5) Senator Wagner opposed in the Senate approval of the House amendment on the ground that it would prevent the setting aside of contracts with

company-dominated unions. Thus he stated (89 Cong. Rec. 7104):

> ". . . We passed the Labor Relations Act because we wanted to do away with company unions. No one objects to that, but what is proposed here will in effect authorize a company union."

(6) The amendment was expressly designed to require a dismissal of the Kaiser proceeding. Yet in the Board's complaint against the Kaiser Company, it was alleged not only that the AFL union involved did not represent a majority of the employees when the contract was entered into, but also that the contract was invalid because the company had given illegal assistance to the AFL (11 Lab. Rel. Rep. 354).

By its clear and express language the Appropriation Act prohibits interference with contracts with any labor union, whether company-dominated or not, and we have been unable to discover anything indicating the intent of Congress was otherwise.

We submit that as a result of this recent Act of Congress, even if we assume that the Board's findings, conclusions, and order were valid in their entirety when issued, the Board's petition for enforcement must be dismissed.

II.

The Board's Findings of Fact Are Not Supported by Substantial Evidence and the Board's Order Is Improper and Illegal.

A. Alleged Domination and Support of the Alliance.

1. Formation of the Alliance.

Preliminary to discussing the evidence we wish to point out that though the Alliance was formed in August, 1937, no charge was filed with the Board asserting it was a company-dominated union until May 1, 1942 [R. 1116]. We submit that where there is such an unreasonable delay of almost five years in challenging the validity of a union as a bargaining agent, under the sound equitable doctrine of laches the Board should not have entertained the charge, and that it abused its power in failing to dismiss the proceeding on respondent's written motion [R. 27-28] which was based on the unfairness in requiring it to defend itself on such stale charges. This Court should refuse to enforce the Board's order on the same ground. This is particularly true where, as here, when the Alliance was formed the CIO—charging union was active in the plant and made at that time an investigation to determine whether there was any basis for a charge of company domination and concluded there was not [R. 776-779, 1231-1232].

Aside from the delay in filing the charge, we submit that the Court should deny enforcement of the Board's order because the Board's findings are not sustained by substantial evidence and the order is improper even on the facts as found. In its brief, the petitioner refers to certain alleged conversations between respondent's officers and supervisory employees relative to the organization of

an inside union. Such conversations cannot, of course, have interfered in any way with the rights of the production employees under the Act, so while we believe the evidence does not support the findings relative to them, there is no necessity of answering the argument in petitioner's brief so far as it relates to such matters.

The alleged company domination in the formation of the Alliance is asserted to have occurred under the following circumstances: Respondent's manager Dachtler instructed the assistant manager Victor Kangas to have an employee join the union to report on its activities; Kangas had an employee Porter carry out these instructions; Livingstone, respondent's personnel director, through Kangas, had Porter talk a group of employees into coming into Livingstone's office and request permission to form an inside union and make certain demands for improved working conditions; Livingstone dictated to Kangas the wording for the inside union's application cards; Kangas had the cards printed, and on Kangas' instructions Porter picked them up from the printer on company time. As Porter was not a supervisory employee [R. 408], the basis of the Board's order is that Porter engaged in the above described activity at the request of the respondent. We submit that there is no substantial evidence that Porter engaged in such activity or, if he did, that he did so at the request of respondent. Finally, in any event, assuming the facts were as found, as a matter of law this did not amount to domination of the Alliance.

The findings as to the alleged activity of Porter were based primarily on the testimony of Porter and in part on the testimony of Kangas. In view of the fact that the testimony of these two witnesses was utterly worthless and the evidence to the contrary was overwhelming, there

was no substantial evidence to support the Board's findings. Kangas and Porter were very close friends [R. 321, 441]; they were both hostile to respondent and pro-CIO, Porter being a member of the Union. Kangas had been discharged by the respondent prior to the Board's hearing, and Porter's employment had been terminated under unusual circumstances hereinafter detailed. These two men were out "to get" the respondent, and the record clearly demonstrates that their testimony was a "cooked-up" story to aid the union and hinder the respondent. We will consider separately the testimony of these two witnesses.

Porter. The testimony of Porter was utterly worthless and entitled to no credibility. We fully recognize the right of the Board to resolve the conflicts in testimony and make the findings of fact, but we submit that the testimony of Porter could not as a matter of law constitute substantial evidence for the following reasons:

(1) Porter was strongly pro-CIO. He joined the union in April, 1942 [R. 274], reported to the Board in the same month as to his alleged activities in organizing the Alliance in 1937 [R. 289], and the union filed its charge with the Board on May 1, 1942!

(2) Porter was likewise hostile to the respondent. This is clearly shown by his testimony as a whole.

(3) Porter left respondent's employ under circumstances which clearly reflect on his trustworthiness and credibility. In July of 1942, Porter reported to the F.B.I. that he had found emory dust in his machine. After an agent of the F.B.I. investigated Porter's machine, he had a private conference with

Porter who immediately thereafter quit respondent's employ in such haste that he wouldn't wait ten minutes for his check and walked out of the plant with the F.B.I. agent after him [R. 1169, 1171-1173, 1195-1196]. About the same time the CIO had reported to the War Production Board that respondent was not making full use of its machines, a report which upon investigation by the W.P.B. proved untrue [R. 580-581, 1202-1203]. The Porter-F.B.I. incident apparently was part of a CIO attempt to discredit the respondent, an attempt which back-fired.

(4) Porter's testimony as a whole shows that he was a weak, halting and unconvincing witness. He was inconsistent, repeatedly contradicted himself, and much of his story was inherently improbable. We can only refer herein to a few of the many instances in Porter's own testimony which demonstrated his complete unreliability. Thus, Porter testified that he overheard Livingstone dictate to Kangas on July 26, 1943 the wording to be printed on the inside union's application cards, which included the name Pacific Parts Workers Alliance [R. 277], and yet he further testified that at an alleged private meeting with Livingstone a few days later, Livingstone asked what the name of the inside union was going to be [R. 247]! He further testified that in 1937 he heard no comments about the possibility of respondent going out of business [R. 280]; yet when he was being pressed on cross-examination to state why he sought to organize an inside union he stated that one of the reasons was the possibility, which had been reported to him, that the plant might close [R. 293]! Although Kangas, according to Porter, told Porter

that Livingstone wished to see him at the Jonathan Club but did not tell him what for [R. 300-301], when Porter arrived at that meeting (which was the one where Porter was allegedly requested to encourage the formation of an independent union), Dachtler asked him if he knew what he was there for, and Porter replied that he did [R. 215]!

(5) Though the Board's findings rest exclusively on the testimony of Porter and Kangas, and they told the same story *in general,* that is, that Porter was instructed to and did encourage the employees to form an inside union, they contradicted each other more often than not as to the *details* of this alleged plot. Thus Kangas testified he asked Porter in 1937 to join the union to report on its activities [R. 373-374]; Porter testified Kangas did not [R. 331]. Porter testified that when Livingstone asked him to undertake his alleged activities, he was promised all sorts of unbelievable privileges and remuneration but that he was not particularly interested in such promises [R. 286-289] (!) and that when respondent allegedly gave him $50.00 through Kangas for this activity he thanked him for it [R. 251]. Yet, according to Kangas, when Porter was allegedly handed the $50.00, Porter cussed out respondent's manager in vile language because he felt the sum was so inadequate [R. 406].

This incident of the alleged payment of $50.00 to Porter was alone sufficient to completely discredit the testimony of both Kangas and Porter. Thus according to Porter, he was promised special favors and remuneration in July, 1937, and in September, 1937, Kangas handed him the $50.00 at Porter's

home in the presence of Mrs. Kangas and Mrs. Porter, stating it was from Hileman, respondent's general manager at that time [R. 249-251, 322-324]. According to Kangas it was in August or September of 1938 (this date is significant, as we shall see), "over a year after the Alliance had been formed" [R. 402], that Hileman gave him an envelope for Porter "for reimbursement for his efforts in organizing the independent union" [R. 403]; he immediately thereafter gave Porter the envelope in the wash room [R. 404-405; and Kangas "did not at that time know what was in the envelope" [R. 405], but learned that evening at Porter's house when he cussed Hileman out [R. 405-406]. As we will hereinafter point out, the record establishes conclusively that the only sum Porter was paid was the amount of $40.00 in July of 1938 for special work investigating a theft at the plant.

(6) In addition to being contradicted by Kangas, Porter was contradicted by a number of reliable witnesses and by unimpeachable documentary evidence and was corroborated by no witness other than Kangas. Thus, though Porter testified he joined the Union in 1937 to report on its activities, Runyan, who was at that time the principal organizer for the Union and was not an employee of respondent at the time of the hearing [R. 771-773], testified that Porter did not join the Union and that he had personally checked the Union's application cards [R. 779-780]. Porter testified that he attended the first meeting of the employees at an electric shop to organize an independent union [R. 237], though all the other witnesses who attended that meeting, includ-

ing Bebb who was the chairman [R. 666-667]; Pfankuch [R. 786] and Creek [R. 1134], no longer an employee, testified that Porter was not present. According to Porter it was he who talked the 15 or 20 employees into going into the meeting with Livingstone, though Wayne Kangas, Victor Kangas' brother [R. 792], testified that it was not Porter who got him to go into that meeting [R. 811], and Stubblefield testified that he was the one who got the employees together [R. 802-803].

Porter's testimony covering the printing of the Alliance's membership cards by itself establishes that no impartial trier of fact could give any credence to Porter's testimony. There is no conflict in the testimony to the effect that Porter, as a "messenger boy" [R. 1134], picked up the cards from the printer. However, Porter's additional testimony relating to the cards completely discredited him. Thus, he testified that he left the plant at about eleven in the morning for about half an hour to pick up the cards and did so on company time [R. 229-230] and, according to Kangas, Porter was back at the plant during the noon hour [R. 355]. Yet his time card for the two week period discloses that he took less than thirty minutes for lunch on each day except on July 27, 1937, the day during which according to Porter he picked up the cards, when he punched out at noon for an hour and 22 minutes [R. 760]. When asked where he got the money for the cards Porter first replied that "someone of the ups gave me the money" [R. 230-231; stricken]; then that Kangas or Hodges gave him the money [R. 231]; later that he couldn't remember where he got it [R. 277]; and finally that he

had "never been able to figure out" who gave him the money for the cards [R. 332]! He was certain, however, of two things: first, that he did not pay for the cards out of his own pocket [R. 231, 332, 333] and, secondly, that the Alliance never reimbursed him for payment for the cards [R. 231, 277-278]. Yet several witnesses testified that as employees interested in forming an inside union they donated sums to pay for printing of the cards [R. 798, 803] and the Alliance produced at the hearing a statement signed by Porter requesting reimbursement for the cards and the Alliance's cancelled check made out to and endorsed by Porter in payment for the cards [R. 1122-1123, 1127-1128]!

The record is full of such inconsistent and unreliable testimony on the part of Porter, and his testimony was contradicted by a number of other witnesses and corroborated by none except Kangas, whom we will now consider.

Kangas. The testimony of Victor Kangas, like that of Porter, was not entitled to any credit, and no impartial trier of fact would have placed any reliance upon his testimony.

(1) Kangas was for the CIO from the very beginning. According to uncontradicted testimony, in May of 1937 Kangas asked at least one employee to join the CIO and to get others to do so. He stated he was concerned about his job and if the CIO would stand behind him he would stand behind the CIO [R. 747-748].

(2) Kangas was also extremely hostile to the respondent. His work was unsatisfactory to the man-

agement [R. 1186-1189] and he was discharged in 1940, or, in the words of Kangas himself [R. 464], "I just beat them before the ink got dry; I understand the skids were greased for me, and I quit before it happened." Thereafter, Kangas threatened "to get" Hileman, respondent's manager, and to put respondent out of business [R. 1190], and made efforts to do so [R. 1200-1203].

(3) In January of 1941, after he had been discharged, Kangas sought to discredit the local management of respondent by sending a malicious and false telegram to the respondent's personnel director in Cleveland [R. 1215-1218]. Kangas, of course, denied that he sent any such wire [R. 481-482]. However, by his own testimony he indirectly admitted his guilt. Thus, when asked for specimens of his handwriting, Kangas freely gave a specimen of longhand and printing with small letters [R. 478, 1212]. He balked, however, when asked to give a specimen of his printing in capital letters [R. 478-479]. The wire which he handed to the telegraph office was printed in capital letters [R. 1216]! The record establishes beyond question by the testimony of an expert examiner of questioned documents [R. 1219-1220] and by other evidence that Kangas in fact sent the wire [R. 1203-1218].

(4) Kangas' testimony as a whole was unconvincing, was full of inconsistencies and inherent improbabilities. Thus, though according to Kangas the nefarious scheme which Livingstone allegedly concocted to have Porter organize an inside union required the greatest secrecy, Kangas talked to Por-

ter a number of times giving him instructions and on each occasion this was at Porter's machine [R. 443] right in the plant within five feet of a drinking fountain [R. 1155-1156]! According to Kangas, in July, 1937, Livingstone one afternoon and again in the same evening asked him to suggest the name of an employee to initiate the organization of an inside union [R. 338]. The second time Kangas replied that he could not think of anyone at the moment [R. [343] though in June of 1937, according to Kangas, he had selected Porter to join the CIO to engage in espionage and Porter was the employee he allegedly suggested to Livingstone the next day! The record is full of such unbelievable statements on the part of Kangas.

(5) As heretofore pointed out, with some examples, in most essential particulars Kangas' testimony was in conflict with that of the Board's star witness, Porter.

(6) Likewise, as in the case of Porter, Kangas' testimony was contradicted by numerous other witnesses and was corroborated by none, excepting Porter. Thus Kangas testified he attended the meeting in July, 1937 between Livingstone and 15 or 20 employees who sought to organize an inside union [R. 360], though, aside from Porter, the other witnesses, including Kangas' brother, who attended that meeting testified that Kangas was not present [R. 796, 807, 1243]. Kangas testified that Porter was not paid for the work he did investigating a theft in 1938 [R. 471], though he stated he gave Porter $50.00 in an envelope from Hileman in August or

September of 1938 for his alleged part in organizing the independent in 1937. Not only did Livingstone deny that he ever asked Porter to initiate an independent union movement or promise to pay him any money [R. 1236-1241] and Hileman denied that he gave any money to Kangas for Porter for any such purpose [R. 1180-1181], but the record establishes beyond question that Porter was paid $40.00 in July of 1938 for the theft investigation [R. 762-766], and the fact that Kangas had knowledge of this payment was established not only by the testimony of Hileman [R. 1181] but by the expense voucher which was approved in writing by Kangas [R. 764-766]! Time will not permit a specific reference to the numerous other instances in which Kangas' story was contradicted by unimpeachable evidence.

We submit that the evidence contradicting the tale of Kangas and Porter was so overwhelming and those two witnesses were so completely discredited that no impartial trier of facts could find that Porter was solicited by respondent's management to initiate an independent union movement or that he was active in the formation of the Alliance. The only explanation of the Board's findings is that the trial examiner was biased and prejudiced against respondent and the Alliance and that the Board, which is hostile to inside unions,[2] merely adopted his findings with-

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[2]"In regard to independent unions, the National Labor Relations Board has consistently pursued a policy aimed at the extermination of these nationally unaffiliated organizations.

"* * *

"That the Board strains every sinew to find company domination of independent organizations is demonstrated by the *International Shoe Co.* case. . . ." *Final Report of the Special Committee of the House of Representatives, 76th Congress, 1st. Session, Appointed Pursuant to H. Res. 258 to Investigate the National Labor Relations Board,* December 28, 1940, in Vol. 4 Bureau of National Affairs, Verbatim Record of the Proceedings, p. 445, at pp. 473, 474."

out an impartial reexamination of the evidence. This circumstance is very material in determining whether there was substantial evidence to support the findings.

At the hearing the Board began its case with the witnesses Porter and Kangas. We believe the record establishes that at the conclusion of their testimony the examiner already had his mind made up. Thus he cross-examined the witnesses of the Alliance and the respondent to break down the conflict in their testimony with that of Porter and Kangas. An appreciation of the trial examiner's lack of impartial attitude can only be obtained by reading the record as a whole. We refer, however, to two illustrative incidents. Respondent produced the "minutes" [R. 1252-1253, 1300-1302] of the meeting between the group of employees and Livingstone on July 26, 1937, which Livingstone dictated [R. 1246-1252, 1277]. Because Porter and Kangas had testified that this meeting was held on July 27, 1937, the examiner became disturbed as the minutes recited the meeting occurred on July 26 [R. 1248]. Though the original and copies of the minutes from the files of both respondent and the Alliance were produced [R. 1253, 1300-1302], the trial examiner simply would not accept the fact that Porter and Kangas were in error and sought to break down the reliability of the minutes by cross-examining Livingstone to establish there was no reason for the minutes to have recited therein that they were "minutes" of the meeting [R. 1249, 1281-1283]! Similarly, when the Board's witness Bebb, one of the leaders in the formation of the Alliance, voluntarily stated his indignation at the interruption with respondent's vital war work resulting from this proceeding, the trial examiner immediately jumped to the erroneous conclusion that the respondent had put the witness up to making the statement

and sought to get such a "confession" from the witness [R. 674-677]. For the convenience of the Board, we are printing as Appendix "C", *infra*, page 52, that portion of the record involving this incident including the cross-examination by the trial examiner.

With reference to our comments on the examiner's cross-examination we should point out that,

> "We do not mean that an examiner is not free to, and should, interrogate witnesses when necessary to elicit or clarify testimony. What we do mean is that, when he does interrogate, he should do so as an impartial participant and not as an advocate endeavoring to establish one side or the other of the controversy before him.
>
> "This record is full of instances of hostile and searching examination of witnesses who might be expected to be favorable to the company or the intervener while similar action does not appear as to witnesses favorable to the complainant."
>
> *Montgomery Ward & Co. v. National Labor Relations Board,* 103 F. (2d) 147, 156 (C. C. A. 8th, 1939).

The trial examiner's bias and prejudice is also clearly shown by his intermediate report. Therein he made an ineffective attempt to whitewash Kangas and Porter [R. 56, note 7], referring only to a small part of the evidence relating to their credibility and making an unsatisfactory explanation even of this impeaching evidence. He further misstated the evidence and made comments directly contrary to the record. Thus he found [R. 56] that Kangas instructed Porter to join the CIO and that Porter did so. He comments that Kangas' and Porter's testimony as to this assignment was uncontradicted, though he fails

to note that Porter testified that it was not Kangas who so instructed him and he completely overlooked the unimpeachable evidence that the CIO records disclosed that Porter had apparently not even applied for membership in 1937 [R. 779-780]. He further finds [R. 61-62] that the meeting of Livingstone and the employees was on July 27, 1943 (since otherwise Porter's tale of events would not have hung together), though to do so he had to disregard the only reliable evidence—the minutes of the meeting—which fixed the date as July 26, 1937. He did so on the unsatisfactory ground that "Livingstone gave no reasonable explanation as to why he used the term 'minutes' to characterize an informal interview," concluded "that the document was not prepared, as Livingstone testified, immediately after the meeting," and "place(d) no reliance upon it," notwithstanding the fact that respondent produced the original from its files [R. 1277, 1301-1302], and the Alliance produced a copy from its records [R. 1249-1253]. The trial examiner further commented that the stenographer who took the dictation from Livingstone of these minutes (and who was not an employee of respondent at the time of the hearing [R. 1308]) in her testimony "admitted that she could not recall when [the date?] the dictation was made," and significantly overlooked her positive testimony in corroboration of Livingstone's [R. 1277] that the dictation was on the same day as the meeting [R. 1309-1310].

There is no need to further discuss the examiner's intermediate report. It is certain that he could not have made the findings, statements, or comments therein or have been so partisan in cross-examining witnesses if he had considered the case with the impartial mind required of a fair trier of fact. Under similar circum-

stances the courts have refused to enforce the Board's orders. *Inland Steel Co. v. National Labor Relations Board,* 109 F. (2d) 9 (C. C. A. 7th, 1940); *National Labor Relations Board v. Washington Dehydrated Food Co.,* 118 F. (2d) 980 (C. C. A. 9th, 1941).

In view of the utter worthlessness of the testimony of Porter and Kangas, the overwhelming weight of the evidence to the contrary, the bias and prejudice of the trial examiner, and the five year delay in the filing of the charge with the Board—a delay which necessarily made it difficult for respondent to present evidence—, the evidence on which the findings of the Board are based is not substantial. It cannot be true that merely because one witness, such as Porter, testifies to an alleged fact, that evidence must be regarded substantial enough to support a Board finding no matter how convincing and overwhelming the evidence to the contrary is and no matter how certainly the record establishes that the witness perjured himself. Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *National Labor Relations Board v. Columbian Enameling & Stamping Co.,* 306 U. S. 292, 300, 59 Sup. Ct. 501, 505 (1939). "Where the evidence is 'so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury'." *Pennsylvania R. R. v. Chamberlain,* 288 U. S. 333, 343, 53 Sup. Ct. 391, 395 (1933). We submit that no reasonable person could accept the tale of Porter and that the evidence was "so

overwhelming" in conflict with his story, that the Board's findings cannot be sustained.

A recent case, very similar in several essential respects to the instant case, sustains completely our position. In *National Labor Relations Board v. Sun Shipbuilding & Dry Dock Co.,* 135 F. (2d) 15 (C. C. A. 3rd, 1943), the company was accused of engaging in espionage and the Board's star witness, one Campbell, a member of the CIO, claimed he had organized the inside union involved at the request of the management. Unlike the instant case, this union was formed as a result of petitions circulated on company time, in part by minor supervisory employees, and the organizational committee meeting was held on company time and property. The inside union was formed during a CIO membership drive, and shortly thereafter a consent election was held by the Board between the inside union and the CIO union, which was won by the independent union. Three years later the CIO filed a charge that the inside union was company dominated. The Board sustained this charge, primarily on the basis of Campbell's testimony, but the court refused to enforce its order.

We have already pointed out that in the instant case there was a five year delay in filing the charge challenging the validity of the Alliance notwithstanding the fact that the CIO at the time of its formation made an investigation and satisfied itself that the Alliance was not assisted by respondent in its organization [R. 776-779, 1231-1232]. No election was held at that time to determine bargaining rights because the CIO concluded it did not have enough supporters to warrant petitioning the Board for an election [Tr. 632]. Under such circum-

stances the following comments by the court in the *Sun Shipbuilding Company* case are equally applicable here (pp. 22-23).

> ". . . The fact that the [CIO] union then voluntarily entered upon the election and for three years thereafter acquiesced in the result only serves to confirm what the record, up to this point, indisputably shows, viz, that there was no substantial evidence of employer domination or interference in the formation of the Association."

That court's comments relative to the effect of the testimony of the Board's witness Campbell in that case are pertinent when considering Porter's testimony herein [p. 25]:

> ". . . However, in determining whether the evidence which the Board accredits is such 'as a reasonable mind might accept as adequate to support a conclusion', it is not wholly without significance that the integrity of the principal witness relied upon by the Board was self-impeached, that he had a bias or interest to serve for which both the Examiner and the Board felt constrained to make allowance in appraising his testimony, and that the Board itself disregarded material portions of his testimony on certain issues when directly refuted."

In view of Porter's attempt at first to make it appear that the respondent herein had paid for the Alliance's membership cards, his final statement that he did not know who paid for the cards though he knew it was not the Alliance, and the conclusive evidence that the Alliance did pay him for the cards, *supra,* pp. 17-18, the following

comments of the court relative to Campbell's alleged activities are particularly significant [pp. 25-26]:

> "In support of the charges that the company dominated and interfered with the formation of the Association, Campbell had testified to a number of matters calculated to show that the company . . . had paid for the membership cards of the Association . . .
>
> "Even accepting that Campbell's admission on cross-examination that the membership cards had been paid for by the Association atoned in a measure for his earlier implication to the contrary, the fact remains that the plain intendment and only purpose of his direct testimony in such regard had been to make it appear that the company had underwritten the cost of the membership cards,—an implication which was disingenuous, to say the least, when he knew, as he admitted on cross-examination a little later, that the cards had been paid for by the Assotion . . ."

The court concluded its comments concerning Campbell's testimony with a statement directly applicable herein (p. 29):

> "In the light of the foregoing, we deem it unnecessary to review in further detail the remaining matters testified to by Campbell, all of which involve his own personal and, ofttimes, secret conduct of as long ago as four years before the hearing at which, for the first time, he revealed the character and extent of his allegations and for which he would now make the company responsible on the basis of his alleged collusive understanding and arrangement with the respondent. The fact that from the very nature of the evident situation an answer in detail to the

> evidence so advanced is difficult and, at times, impossible should not be availed of as inferential confirmation that the testimony is substantial. Especially in such circumstances, the inherent probative value of the testimony remains a question of primary concern."

Notwithstanding the efforts of Kangas and Porter to build a case against respondent, the evidence establishes that Porter had no significant part in the organization of the Alliance and that the independent was formed free from employer domination or control.

The CIO had been active at respondent's plant prior to the time that respondent purchased it in April of 1937. For some time *prior* to Livingstone's visit to the plant, as found by the trial examiner [R. 55], the employees discussed the possibility of forming an inside union [R. 662-663, 775-776, 784, 792-793]. In fact, according to Wayne Kangas, Victor Kangas' brother, several days before the meeting between Livingstone and the fifteen or twenty employees (which was before Porter according to his own testimony had undertaken any activity relative to forming an inside union), a group of employees gathered together to see the management, but abandoned the effort at that time because not enough men were then assembled [R. 794-795]. That the independent union movement was well along its way before Porter took any action, is established by the uncontradicted testimony that about a week before Livingstone's meeting with the men, when employee McIntire asked Kangas about the efforts being made by the employees to form an inside union, Kangas replied that he wanted the CIO in and that, "We have got to get a move on, or this independent is going

to beat us" [R. 1072-1073]. Many of the men preferred an inside union because of the high initiation fees and dues of the national unions, they were afraid the national union might call a strike, and they desired to have their own people familiar with the shop conditions to bargain for them [R. 663, 774, 776].

About a week following the first abortive attempt of the employees to see the management, a second time the group got together and did then in fact have a meeting with Livingstone. This is the meeting Porter claims to have initiated, although other employees denied that Porter was responsible for getting the employees together [R. 811] and employee Stubblefield claimed credit for getting the employees together for that meeting [R. 803]. The employees at that meeting informed the management that they were organizing an inside union and asked if the company would bargain with them. They were advised that the company had the duty to recognize their union under the Wagner Act if they represented a majority of the employees, but that otherwise the company could have nothing to do with their movement and could not say a word about it [R. 796, 801, 1252-1253, 1300-1302]. They were cautioned however, not to solicit members on company time or property and not to coerce any employees into joining their union and they were refused the request to permit them to use some of the company's paper on the ground that that would be illegal [R. 664-665, 796-797, 801-802, 1252-1253, 1300-1302].

Following this meeting application cards for membership in the inside union were obtained and distributed. While the CIO was soliciting members on company time [R. 774] the employees distributing the cards for the

inside union did so outside the company gate [R. 651, 804] and the organizational meetings were held at a rented hall [R. 650]. A constitutional committee was appointed for the drafting of the Union's constitution and by-laws [R. 656-657] and at a meeting on August 3, 1937 the constitution was approved and signed by the employees present at that meeting constituting a majority of the employees [R. 107-109]. Thereafter the Alliance submitted to the management evidence in the form of application cards and its signed constitution that it represented the employees and asked for recognition [R. 1254-1255]. After checking the membership claims the respondent, being satisfied that the Alliance did represent the employees, recognized it and negotiated a contract with that union [R. 814-815, 1254-1255, 815-820, 122-129].

We submit that the record establishes without substantial conflict in the evidence that the Alliance was formed by the employees and without any suggestion or encouragement from respondent. However, even if Porter's tale were true, we submit that the Alliance was not formed in violation of the Wagner Act. Porter did not, of course, tell any of the employees that he was active in the organization of the inside union at the suggestion of the management [R. 238-239, 292, 297-298]. The employees had no knowledge of Porter's alleged instructions from respondent and they did not even recognize him as a leader in the inside union movement. Respondent did nothing to coerce the employees into joining an inside union, or even encourage them to do so. There was no testimony by Porter, Kangas, or anyone else, that any officer or supervisory employee of respondent said a single word to any of the employees to encourage them to join

an inside union. The only statement from management to the employees at this time relative to unions apparently was Kangas' advice to the men that they could belong to any union they wanted to and it was none of his business [R. 427].

There is no doubt that a majority of respondent's employees joined the Alliance of their own free and uncoerced will because they desired to be represented by an independent union. The employees, according to the CIO organizer at that time, were very slow in coming into the CIO and early in the fall of 1937 the CIO abandoned its attempt to organize the employees of respondent because, according to the business agent of the CIO, they did not want the CIO and "there was no use trying to force it on them" [R. 777].

We submit that not only is there no substantial evidence that Porter was instrumental in forming the Alliance, or if he was that he acted on instructions from respondent's management, but that even if we assume Porter's tale were true, respondent did not dominate or interfere with the formation of the Alliance since the employees formed and joined the Alliance solely because, without influence from respondent, they wanted an inside union. In concluding this discussion we wish to point out that the case of *National Labor Relations Board v. Germain Seed & Plant Co.*, 134 F. (2d) 94 (C. C. A. 9th, 1943), relied on by petitioner, is not pertinent to the instant case. Aside from other distinguishable factors, in the *Germain* case a supervisory employee not only suggested the formation of an inside union, but also called the employees together for two meetings to organize a union and at those meetings he spoke and made threats of company disfavor to those who joined the AFL.

2. Alleged Support of Alliance.

The petitioner claims that respondent gave support to the Alliance by permitting its executive committee to meet on company property and time. The only evidence as to such meetings on company time was the testimony of one witness that the meetings were held after the day shift went off, and that twice, in August and September or October of 1941, while he was working the swing shift he attended meetings after punching in [R. 565-568]. As soon as respondent's management received word of this [R. 1100, 1192-1193], the Alliance committee was advised in writing that it must hold its meetings on its own time [R. 1095-1096].

Secondly, petitioner complains that respondent permitted the Alliance to solicit members and collect dues on company time. While such activity did begin some months or years after the Alliance had been formed, the respondent sought to prevent it [R. 1010, 1093-1094, 1139, 1156].[3] In any event, from the very beginning [R. 774] the CIO continuously campaigned on company time without interference [R. 738-739, 744-745, 750]. Respondent tried to stop both organizations from using company time for union business, though it penalized no one for such interference with production. The result was that the Alliance "stopped [union activity on company time] just as long as the other organization [CIO] stopped when

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[3]Hileman readily admitted the statement referred to in the petitioner's brief in footnote 7, page 11 [R. 1186]. This incident occurred after respondent had knowledge that the CIO had filed its charge with the Board [R. 1116]. At this meeting, Hileman was extremely "burned up" [R. 616, 1174] because Smith and Spencer had been active in having the CIO make a complaint to the War Production Board that respondent was not making full-time use of all of its machines, an assertion which was untrue, as an inquiry would readily have shown [R. 584-587, 1167-1168, 1202-1203]. Notwithstanding this statement of Hileman's, CIO activity on company time continued unabated without interference from respondent.

they were cautioned" [R. 1145]. Since respondent was neutral in this connection, permitting (only by failing to discipline) the same activity by both organizations, it gave no unlawful support to either. *National Labor Relations Board v. Sun Shipbuilding & Dry Dock Co.,* 135 F. (2d) 15, 21 (C. C. A. 3rd, 1943); *Ballston Stillwater Knitting Co. v. National Labor Relations Board,* 98 F. (2d) 758, 761 (C. C. A. 2d, 1938); *National Labor Relations Board v. Mathieson Alkali Works,* 114 F. (2d) 796, 801 (C. C. A. 4th, 1940). Petitioner recognizes that there is no illegal support given to one organization merely by permitting union activity on company time unless the company denies the same privilege to a competing organization. Thus, in its complaint [R. 35], petitioner alleged that respondent permitted the Alliance to use company time but denied this concession to the Union, an allegation which is not sustained by the record.

Nothing need be said about the incident when Hileman was consulted by Overlander (petitioner's brief, p. 11) relative to the resignation of the Alliance's president [R. 631-641, 1183-1198, 1189-1199] other than to point out that Baldwin, the one employee Hileman allegedly voiced an objection to as a successor president [R. 634], was in fact the one elected as president. Certainly this demonstrates that the respondent did not influence the employees' choice.

The facts in connection with the respondent's notice of October 23, 1941 [R. 555-556] asking certain supervisory employees to resign from the Alliance establish lack of domination of that organization rather than company domination. The contract between the respondent and the Alliance applied to all factory employees except those em-

ployed in a supervisory capacity [R. 165]. The parties believed that such supervisory employees were only those with the right to hire and fire. However, shortly before October, 1941, certain interpretations of the Wagner Act were issued, which came to the attention of both respondent and the Alliance, indicating that employees need not have the right to hire and fire to be considered supervisory employees representing management. In the light of these interpretations, the Alliance committee discussed the advisability of having certain employees ousted from the union and the matter was discussed at a union meeting. The Alliance's president then brought the matter up with respondent's personnel manager, and it was agreed between them that the employees involved would thereafter be considered as supervisory employees and the Alliance would no longer represent them and they should resign from the union, which they did [R. 555-556, 1105-1106, 1113-1114, 1138-1139, 1146-1150, 1152-1153]. Subsequently, at a meeting between respondent and the Alliance committee the Alliance representatives pointed out that one additional employee was then considered a supervisory employee and it was agreed to remove his rate from the contract [R. 942].

As a matter of fact the record in this proceeding does not establish that any of these so-called supervisory employees held positions which made it improper for them to be members of or to take an active part in the Alliance. *National Labor Relations Board v. Mathieson Alkali Works,* 114 F. (2d) 796 (C. C. A. 4th, 1940); *Magnolia Petroleum Co. v. National Labor Relations Board,* 112 F. (2d) 545 (C. C. A. 5th, 1940); *National Labor Relations Board v. Sparks-Withington Co.,* 119 F. (2d) 78

(C. C. A. 6th, 1941); *National Labor Relations Board v. Swank Products, Inc.*, 108 F. (2d) 872 (C. C. A. 3rd, 1939); *National Labor Relations Board v. Arma Corp.*, 122 F. (2d) 153 (C. C. A. 2nd, 1941). The respondent and the Alliance bent over backward to prevent any employer interference by having the employees named in the October, 1941 notice resign. Moreover, none of the employees therein named took any active part in the Alliance while they held such minor supervisory positions until almost a year after the Alliance was formed. Creek did not assume any supervisory duties until about June of 1938 when he had two men under him [R. 1090-1092]; Weisser did not assume any supervisory duties until the fall of 1940 [R. 1102]; Fickle was merely an experimental man in the tool department [R. 537, 1091].

Not only did the respondent not give illegal support to the Alliance, but it failed even to give it such permissible assistance as it could. At the very first meeting with the group of employees who sought to organize an inside union, the respondent refused to assist them even by allowing them to use some paper [R. 797, 801-802]. The first demand of the Alliance after it was organized was for a closed shop. Respondent refused this demand at that time [R. 815] and also when it was again made in 1939 [R. 852]. Similarly respondent refused the Alliance's request for a check off [R. 1055, 1059] and for lists of new employees [R. 1101]. Respondent disciplined the president of the Alliance with a ten day lay-off because he was late in returning to work from a vacation [R. 1150-1151, 1185-1186], and refused to reinstate employee Bright, who was discharged for not wearing his plant identification button, though being advised that on

the occasion he was at the plant seeking to dissuade some of the employees from attending a CIO meeting [R. 999-1008].

That the Alliance was free from employer domination is shown, we believe, by its accomplishments. It obtained contracts which compare favorably with contracts negotiated by national unions [R. 122-208]. The Alliance committee met at arms length with respondent's management and as they gained experience became more insistent on granting of their demands [*Cf.* R. 880-886]. An examination of the minutes of the meetings between respondent and the Alliance [R. 814-1070] will demonstrate beyond a shadow of doubt that the Alliance was properly representing the employees free from any control whatsoever by respondent.

We submit that there was no substantial evidence that the Alliance was formed in violation of the Act or that it at any time received illegal support from or was dominated by respondent. The Court should, therefore, refuse to enforce the Board's disestablishment order.

B. Alleged Interference, Restraint, and Coercion.

With one possible exception,[4] the statements allegedly made (petitioner's brief, pp. 15-17) by respondent to its employees were constitutionally permissible and did not amount to interference. *National Labor Relations Board v. Virginia Electric & Power Co.,* 314 U. S. 469, 62 S.

[4]The evidence does not support the assertion in petitioner's brief (page 16) that respondent's supervisory employees engaged in an "organized campaign" to dissuade Crank from joining the CIO. Crank first approached Millman about the matter, and so far as appears he may have begun the conversations in the other two instances testified to [R. 513-518]. Millman's comment is related in footnote 5, *infra.* When the incident referred to in the petitioner's brief, footnote 13, page 16, came to the attention of respondent's managers, immediate action was taken to see that no such occurrence would happen again [R. 1099, 1103-1104, 1111-1112].

Ct. 344 (1941); *National Labor Relations Board v. Citizens-News Co.,* 134 F. (2d) 962, 970 (C. C. A. 9th, 1943); *National Labor Relations Board v. Union Pacific Stages,* 99 F. (2d) 153, 178 (C. C. A. 9th, 1938); *Diamond T. Motor Car Co. v. National Labor Relations Board,* 119 F. (2d) 978, 982 (C. C. A. 7th, 1941); *Midland Steel Products Co. v. National Labor Relations Board,* 113 F. (2d) 800, 803-804 (C. C. A. 6th, 1940); *The Press Co. v. National Labor Relations Board,* 118 F. (2d) 937, 942 (C. A. D. C., 1940), cert. den. 313 U. S. 595, 61 S. Ct. 1118 (1941); *National Labor Relations Board v. American Tube Bending Co.,* 134 F. (2d) 993 (C. C. A. 2nd, 1943).

Certainly Smith's testimony [R. 577] that Millman stated respondent would close its plant rather than recognize the CIO does not amount to substantial evidence of interference.[5] Not only did Millman deny the statement [R. 1101-1102], but Smith's own testimony was of very little value in view of his testimony that while the Alliance was busy all over the plant on company time [R. 530-531] the CIO did nothing on company time [*Tr.* 433].[6] The record is clear that in fact the CIO did solicit members continuously on company time [R. 774, 738-739, 744-745, 750], and Smith's denial that he never did so

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[5]In contrast with Smith's testimony is that of Crank, a CIO member, who advised Millman that he was thinking of joining the Union. Millman's reply was that he felt Crank was wrong in his ideas about the matter, but that he couldn't say much more and Crank could make up his own mind [R. 514-515].

[6]Testimony of Smith at page 433, lines 8-15 of the Transcript (not reprinted in record):

"Q. You, of course, never discussed it on company time? A. As I recall I didn't.

Q. Or never tried to get anybody to join the CIO on company time A. I believe not.

Q. Or never saw any other CIO member try to get anybody to join on company time? A. Not that I know of."

was directly refuted by employee Gibbon [R. 745]. In any event, the statement made no impression on Smith who joined the CIO shortly thereafter and was the first to wear a CIO button at the plant at that time [R. 596-597]. *Cf. Diamond T. Motor Car Co. v. National Labor Relations Board,* 119 F. (2d) 978, 982 (C. C. A. 7th, 1941); *Ballston-Stillwater Knitting Co. v. National Labor Relations Board,* 98 F. (2d) 758, 762 (C. C. A. 2nd, 1938). Furthermore, such an isolated instance of alleged employer interference is not sufficient to sustain a finding of a violation of the Act. *E. I. du Pont de Nemours & Co. v. National Labor Relations Board,* 116 F. (2d) 388, 400 (C. C. A. 4th, 1940), cert. den. 313 U. S. 571, 61 S. Ct. 959 (1941).

The only other coercive statements alleged to have been made by respondent's supervisory employees were those testified to by Porter and Kangas. Not only was the statement allegedly made, according to Kangas, by Hileman to the Allance Committee denied by Hileman [R. 1178], but Bebb, who was present at this meeting [R. 390], denied any such statement was made [R. 669-670]. For the reasons heretofore pointed out, the testimony of Porter and Kangas could not properly furnish a basis for any finding.

The hearing in this proceeding covered the activities at respondent's plant over a period of more than five years. Not a single act of discrimination against a CIO member was shown to have occurred during that entire period of time, though respondent did not hesitate to discipline members of the Alliance, as in the instances involving Baldwin and Bright, above referred to. The record establishes that the employees of respondent knew

that they were free to take, and they did, any action relative to unionism that they desired without fear of any reprisals from respondent. Under such circumstances, we submit, no violation of Section 8(1) of the Act occurred.

Conclusion.

It is submitted that under the National Labor Relations Board Appropriation Act, 1944 the Board's petition herein for enforcement of its order must be denied in its entirety. Furthermore, enforcement must be denied because of the unreasonable delay in the filing of the charge. Finally, there is no substantial evidence establishing that respondent dominated the Alliance in its formation or administration or otherwise interfered with the rights of its employees and the petition for enforcement must therefore be denied.

Dated: August 7, 1943.

Respectfully submitted,

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APPENDIX A.

National Labor Relations Act.

The pertinent provisions of the National Labor Relations Act [Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Secs. 151-166 (Supp. II, 1936)] are as follows:

Section 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively

safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Sec. 2. When used in this Act * * *

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the

District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

* * * * * * * * *

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to Section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

* * * * * * * * *

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * * * * * * *

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate tem-

porary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

APPENDIX B.

Legislative History of the National Labor Relations Board Appropriation Act, 1944.

(All page references herein are to Volume 89 of the Congressional Record.)

H. R. 2935, "An Act making appropriations for the Department of Labor, the Federal Security Agency, and related independent agencies, for the fiscal year ending June 30, 1944, and for other purposes," was introduced in the House of Representatives on June 14, 1943. On the same date Mr. Hare, from the Committee on Appropriations, submitted a report (H. Rep. 540, 78th Cong., 1st Sess.) thereon, and the Bill was then submitted to the Committee of the Whole House (pp. 5918, 5927). The Bill was debated in the House on June 15 and June 16, 1943 (pp. 5998-6019, 6030-6053).

During the debate in the House on June 16, 1943, Representative Hare offered an amendment to the Bill adding to the provisions of Title IV thereof, appropriating funds for the National Labor Relations Board, the following:

> "No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor which has been in existence for 3 months or longer without complaint being filed." (p. 6047.)

In explaining his amendment, Mr. Hare stated as follows:

> ". . . It simply means that the National Labor Relations Board will not be charged with the responsibility, nor will it have the authority or right to take jurisdiction of a complaint unless the contract

> under which the complaint is made has not been in force for as much as 3 months. Where an agreement between management and its employees has been in operation for as long as 3 months or more and no complaint has been filed by management or no formal complaint filed by the employees, National Labor Relations Board would not have jurisdiction and would be relieved of any duty or expense until the availability of these funds expires."

After a very brief discussion in which reference was made to the disturbances caused by the National Labor Relations Board interference with existing collective bargaining contracts, as in the Kaiser shipyards, the amendment was agreed to (p. 6047). The Bill was passed by the House the same day (p. 6053).

On June 18, 1943, the Bill was read in the Senate and referred to the Committee on Appropriations (p. 6131). On June 24, 1943, Mr. McCarran from the Committee on Appropriations submitted a report (S. Rep. 342) on the Bill (p. 6485) in which the Committee recommended that the Hare Amendment in the House to Title IV be stricken. The debate on the Bill in the Senate began June 26, 1943 (p. 6644). When the proposed amendment to strike out the Hare Amendment was taken up for consideration, Mr. Bridges offered a substitute for the Committee Amendment which proposed the inclusion of the following:

> "No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor, copy of which has been filed with the Labor Department for 3 months or longer without complaint being filed by a labor organization." (p. 6648.)

"This amendment," according to Mr. Bridges, was "aimed to stabilize labor differences during this critical wartime period." In the discussion that followed, the members of the Appropriation Committee and other members of the Senate indicated they approved the purpose of the Hare Amendment but they felt that some change in language might be necessary, and therefore the matter should go to conference. With this assurance, Mr. Bridges withdrew his proposed amendment (p. 6651) and the Committee Amendment striking the Hare Amendment from the Bill was then adopted (p. 6656).

The Bill was further debated in the Senate on June 28 (pp. 6718-6763) and June 29, 1943 (pp. 6821-6822). On the latter date the Bill passed the Senate and McCarran, McKellar, Russell, Bankhead, Truman, Lodge and White were appointed conferees. On June 30, 1943, the House appointed as conferees Hare, Tarver, Thomas (of Texas), Anderson (of New Mexico), Engel, Keefe, and H. Carl Anderson (p. 6924).

The same evening the conferees made their report (pp. 6960-6961), in which they reported disagreement on Senate Amendment No. 19 which was the amendment striking from the Bill the Hare Amendment adopted in the House. In the statement accompanying the report by the managers on the part of the House, the following comments were made relative to this Amendment (p. 6961):

> "Amendment No. 19: Strikes from the bill a provision, inserted by the House, prohibiting the use of the funds of the National Labor Relations Board in any case involving an agreement between management and labor which has been in force

more than 3 months. A motion will be made to recede from disagreement and concur in the amendment with an amendment as follows:

"Restore the matter proposed to be stricken out and add at the end thereof the following:

" '*Provided,* That, hereafter, notice of such agreement shall have been posted in the plant affected for said period of three months, said notice containing information as to the location at an accessible place of such agreement where said agreement shall be open for inspection by any interested person.' "

On July 1, 1943, the conference report was discussed in the House (p. 7014). Relative to Senate Amendment 19, Hare moved to concur in the substitute amendment proposed by the conferees (p. 7022). During the discussion of this motion, the following comments were made:

". . . If you adopt the suggestion of the chairman of the subcommittee, the gentleman from South Carolina [Mr. Hare], you will in effect be saying that all existing contracts are frozen as they are, as far as an investigation by the National Labor Relations Board is concerned. As to whether they have been filed for 90 days heretofore or not does not matter. It is only hereafter that the 90-day provision applies, and you do say that all these contracts, whether phony or not, cannot be set aside by the National Labor Relations Board." (Anderson, p. 7025.)

"It was our information that the C.I.O. is preparing to raid, as the saying goes, quite a number of other industrial plants of the country if they are successful in their efforts to get the National Labor Relations Board to hold this election and install them as bargaining agents for the two Kaiser shipyards

on the west coast. We think that, regardless of the merits of the controversy, it would be extremely unfortunate to have such a controversy interfering with production at this particular time, and that the doctrine of the greatest good for the greatest number, that is, the matter of securing greatest efficiency in production for the war effort, should be the most important objective governing our actions. With that reason in view we should enact this proviso and stop this squabbling out there on the Pacific Coast or anywhere else in the country until this emergency is over, especially when the contract, whether it was proper at the time of its inception or not has been in effect for 3 months without complaint." (Tarver, p. 7026.)

"The attitude of the Senate conferees very clearly was that we as a Congress should endeavor to see if we could not stabilize conditions at least for the duration and allow these bargaining rights under existing contracts to remain as they are, provided they have been in existence for a period of 3 months without a complaint being filed. As to any future contract, if a complaint is filed within 90 days after its posting in the plant affected then as a matter of course the N.L.R.B. will have jurisdiction to order an election. It relates only to placing these existing contracts in status quo. If you vote for the committee amendment you are voting to freeze the contracts that have been in existence for a period of 3 months or more without a complaint being registered against them. That is all there is to it." (Keefe, p. 7027.)

Following this discussion, the Hare motion carried (p. 7027).

In the Senate on July 2, 1943, Senator McCarran moved that the Senate concur in the Amendment of the House to Senate Amendment 19 (p. 7103) and with reference thereto, stated as follows:

> ". . . We believe that when agreements are now in existence, regardless of whom the agreements may favor, the agreements should be frozen, if I may use that term, or at least stabilized for the duration of the war, and not disrupted by confusion, misunderstanding, elections, or what not."

After some discussion in which objection was voiced to the motion because the House provision would practically repeal the Wagner Act and would legalize company dominated unions, McCarran's motion carried (p. 7109).

Thereafter, on July 3, 1943, the Bill was referred again to conference because of disagreement on another Senate amendment, No. 24 (p. 7164). On July 8, 1943, the conferees reported (Rep. 698) that they were unable to agree and when the House adhered to its disagreement (p. 7579) the Senate receded from its Amendment No. 24 (p. 7545) and the Bill thus passed both houses of Congress. It was approved on July 12, 1943 as The Labor-Federal Security Appropriation Act, 1944 (Pub. 135, Chpt. 221, 78th Cong., 1st Sess.), Title IV thereof relating to the appropriations for the National Labor Relations Board being cited therein as the National Labor Relations Board Appropriation Act, 1944.

APPENDIX C.

Excerpts From Record, Pages 674-677.

(Testimony of Lester Sylvester Moses Bebb.)

Mr. Watkins: I think that is all.

The Witness: Mr. Examiner, I would like to make one statement.

Trial Examiner Whittemore: All right.

The Witness: In bringing this case up, I feel personally very deeply that we are in vital war defense work, defending the lives of our men out on the battlefield and I really feel that whoever made these charges, either management or the union, are the largest saboteurs we have in the United States. They are drawing men away from their work, vital defense work.

Trial Examiner Whittemore: What do you mean by that?

The Witness: That all these men who are here are wasting [542] their time while away from their vital defense work. They are losing man hours in putting out our defense equipment that the men need so badly.

Trial Examiner Whittemore: Where did you get that idea?

The Witness: There is only one important thing in this world now and that is to save our country, our homes, our families and the men who are out in the field and I feel things that are of so little importance like this when life and death mean a lot more than anything else.

Trial Examiner Whittemore: Is that your own personal feeling?

The Witness: It is.

Trial Examiner Whittemore: Did anybody suggest you make this statement when you got up here?

The Witness: No, sir.

Trial Examiner Wittemore: Why do you tell me that?

The Witness: I want it to go into the record, the way I feel about the whole thing or anything else.

Trial Examiner Whittemore: Why do you want it to go into the record? Did you say anything to counsel for the Board when he asked you to come and testify?

The Witness: No, sir, I did not.

Trial Examiner Whittemore: You waited before you got up here before you made the statement on the record?

The Witness: Yes, sir. [543.]

Trial Examiner Whittemore: That is all.

Mr. Watkins: Let me say one thing, Mr. Examiner. When I talked to Mr. Bebb, Mr. Bebb told me just the same thing he has told the Examiner.

Trial Examiner Whittemore: And you suggested he put it on the record?

Mr. Watkins: Just a minute and I will make my statement precisely as it happened.

He told me substantially what he said here and wanted to state it in the hearing. I told him that nobody could ask any questions on that but if he wanted to make a statement to go ahead if he wished to do so and if the Examiner stopped him, why, that would be all there was to it. That is what took place.

Mr. Baldwin: May I asked the witness one question?

Mr. Watkins: And I might say I agree with him one hundred per cent.

Trial Examiner Whittemore: Well, I think the answers show something to that effect.

Q. (By Mr. Baldwin) Mr. Bebb, when did you resign as secretary of the Alliance? A. In April of 1942.

Q. Why did you resign? A. I have been studying welding—making welding my life work in order to keep up with the new work in the welding [544] field, and I decided I wanted to study a little harder and learn the newer parts of welding.

Q. Did you make a statement at that time to any one, that one of your main reasons for resigning was because you were interested in doing war work and it was taking up too much of your time? A. I did.

Q. Did you say at that time that the union wasn't as important as the war going on? A. I did.

Mr. Moore: I will object to this line of questioning. I will stipulate that he resigned because he wanted to.

Trial Examiner Whittemore: Why all this?

Mr. Baldwin: I merely want to point out that I know this man and I know that he is telling the truth. I want to point out that he made these statements prior to any time he was ever here. [545.]